Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of the Association for Local Telecommunications Services ("ALTS") for a Declaratory Ruling Establishing Conditions Necessary To Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)))))	CC Dkt. No. 98-78

COMMENTS OF U S WEST, INC.

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SUMMARY

Four months ago, U S WEST filed a petition for advanced-services regulatory relief demonstrating that CLECs and other data service providers were failing to serve smaller and rural communities in U S WEST's region. The petition set forth in detail how granting U S WEST regulatory relief would enable it to deploy data infrastructure deeper into the West and Midwest than any other carrier has done. It also demonstrated how U S WEST provided CLECs with unbundled, conditioned loops and collocation (including cageless collocation), which is all they need to be able to provide competitive services on an equal footing with U S WEST.

ALTS has now filed, in effect, an out-of-time third set of comments on that petition, claiming that the petition cannot be granted until the Commission completes general proceedings on the scope of Sections 251, 252, 271, and 706 of the Telecommunications Act, together with a broader rulemaking on collocation. But ALTS does not dispute the specific facts U S WEST presented, nor does it provide evidence that U S WEST is failing to provide CLECs with everything they in fact need from incumbents to provide competitive data services. Accordingly, notwithstanding ALTS's petition, the Commission should continue considering U S WEST's petition for individual relief on its own merits and promptly issue a decision.

In any event, ALTS makes no legal case for the declaratory ruling it seeks. ALTS asserts, without argument, that Sections 251, 252, and 271 necessarily govern incumbent LECs' provision of data services unless the Commission forbears from their application. But Congress made clear that the unbundling and discounted resale duties of Section 251(c) apply to carriers only in their capacities as "incumbent local exchange carriers," and these data services do not constitute "telephone exchange service or exchange access" — the services that define a LEC. Moreover, even if this section did apply, the Commission would still have authority under Section 251(d)(2) to exclude the non-bottleneck data facilities from the list that must be unbundled. As for Section 271, the Commission may use its statutory power to modify LATA boundaries to waive LATA restrictions for the limited purpose of enabling BOCs to bring data services to communities it could not otherwise economically serve. Finally, ALTS's proposed ruling would eliminate Section 706 as a tool for achieving Congress's infrastructure goals.

ALTS's request for relief makes no sense on policy grounds. ALTS's laundry list of technical demands is premised on the erroneous notion that CLECs are entitled to expropriate each and every innovation and investment that an incumbent LEC makes. ALTS does not attempt to distinguish facilities that are currently bottlenecks from those that CLECs can and do obtain from many sources, or even to distinguish the interconnection needed for voice services from that needed for data. ALTS's demands would squelch any incentive an incumbent would have to innovate and invest in infrastructure.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby opposes the petition for declaratory relief filed by the Association for Local Telecommunications Services ("ALTS"). U S WEST notes that the petition addresses several issues raised in a request for regulatory relief that U S WEST filed nearly four months ago. Whatever timetable the Commission believes is appropriate for considering the ALTS petition, U S WEST respectfully requests that the Commission not delay its resolution of U S WEST's earlier-filed request for relief.

PRELIMINARY STATEMENT

U S WEST filed its petition for advanced-services regulatory relief in late February. That petition demonstrated how smaller and rural communities in U S WEST's region lack access to advanced telecommunications infrastructure, largely because existing providers are failing to deploy high-capacity facilities outside large cities. The petition set forth in detail how granting regulatory relief to U S WEST would enable it to deploy data infrastructure deeper into the West and Midwest than any carrier has done so far. U S WEST also demonstrated how it had structured its data offerings in a way that allows other carriers and Internet service providers to compete; it committed to continue providing CLECs with unbundled, conditioned loops and

collocation space, and explained how it is currently working with CLECs to offer them cageless collocation in its central offices. The Commission received two rounds of comments on U S WEST's petition, and ALTS participated in both rounds.

Well after the comment period closed, ALTS filed this petition for a declaratory ruling, claiming, for the first time, that the Commission cannot grant U S WEST's request for relief until it completes several new proceedings. But ALTS does not dispute any of the facts U S WEST presented. It does not rebut U S WEST's showing that CLECs are bypassing smaller and rural communities, nor does it refute U S WEST's proof that CLECs do not need access to the unbundled electronics of incumbent LECs' packet-switched networks in order to provide competitive data services — something that several CLECs conceded in their comments on U S WEST's petition. And while ALTS complains at length about alleged anticompetitive activities of other carriers (primarily carriers that had not even asked for regulatory relief at the time ALTS filed its petition), ALTS presents no evidence that U S WEST is refusing to provide conditioned loops, adequate collocation (including cageless collocation), or anything else a CLEC in fact needs from an incumbent LEC to provide competitive data services. In short, whatever ALTS has or has not shown about the need for a general rulemaking on advanced services, it has not identified any issue that must be resolved in such a rulemaking before the Commission could grant U S WEST the particular regulatory relief it has sought based on the specific facts it presented; nor has it presented any justification for continuing to deny Americans in rural and smaller communities access to these advanced services while additional proceedings take place.

Furthermore, ALTS makes no legal case for the declaratory ruling it seeks. ALTS asserts, without any argument, that Sections 251, 252, and 271 govern a Bell company's packet-

switched data offerings and disable the Commission from granting regulatory relief. But Congress made clear in the 1996 Act that the unbundling and discounted resale obligations of Section 251(c) apply to carriers only in their capacity as "incumbent local exchange carriers" — that is, only when they provide "telephone exchange service or exchange access." Moreover, even if Sections 251 and 252 did apply to incumbent LECs' packet-switched data services, the Commission would still have authority under Section 251(d)(2) to exclude the non-bottleneck data facilities from the list of elements that must be unbundled. As for Section 271, the Commission very recently found that its statutory power to modify LATA boundaries authorizes it to waive LATA restrictions for the limited purpose of enabling carriers to bring advanced data services to customers who could not otherwise be served economically. In any event, as U S WEST has already shown in support of its request for relief, whatever the restrictions imposed by other sections of the Act, Section 706 empowers the Commission to forbear from enforcing them if forbearance would encourage the timely deployment of advanced telecommunications infrastructure to underserved communities.

What is more, ALTS's request for expanded regulation makes no sense on policy grounds. ALTS presents a laundry list of technical demands premised on the notion that CLECs are entitled to expropriate every innovation and investment that an incumbent LEC makes. In demanding access to every single network facility that incumbents deploy, for example, ALTS makes no effort to distinguish those facilities that are currently bottlenecks (such as conditioned loops) from those (such as DSLAMs) that CLECs can and currently do obtain from many competitive sources. (Indeed, ALTS does not even attempt to limit its request for relief to the advanced data services at issue. Many of its complaints, such as incumbents' alleged delays in

loading NXX codes, have nothing at all to do with such services.) As Chairman Kennard has acknowledged, indiscriminately extending incumbents' unbundling and discounted resale duties to their advanced data offerings would make for disastrous technology policy, as it would blunt their incentives to invest in infrastructure and deploy new services. To be sure, CLECs do currently need access to some incumbent LEC facilities to be able to provide xDSL services. In these comments, therefore, U S WEST makes every effort to sort through ALTS's many requests and identify those that may be justifiable.

I. NOTHING IN THE ALTS PETITION PREVENTS THE COMMISSION FROM CONSIDERING AND DECIDING U S WEST'S PETITION FOR RELIEF ON ITS OWN MERITS.

Four months ago, U S WEST asked the Commission for individual regulatory relief based upon a specific factual showing that (1) existing data service providers were failing to deploy adequate data infrastructure to the smaller and rural communities in U S WEST's service region, threatening to relegate these communities to being Information Age "have nots"; (2) granting U S WEST limited relief from unbundling, discounted resale, and interLATA restrictions would enable it to bring advanced data services to customers who would not receive them otherwise;[1/] and (3) granting U S WEST its requested relief would preserve competing carriers' ability to provide data services, and would enable all information service providers

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1/ U S WEST noted in its petition that no special waiver is required to exempt data services from the requirements of Section 251(c), because when a carrier provides data services it is not acting in a capacity as an incumbent LEC. U S West Pet. 45-46 n.24. U S WEST elaborates on this analysis below.

within reach of U S WEST's backbone to offer their customers more sophisticated and less expensive services. ALTS filed two rounds of comments on U S WEST's request.

Even though the comment period on that request has closed, ALTS now has, in effect, filed a third set of comments, triggering new rounds of pleadings. And ALTS now claims that the Commission should not grant U S WEST individualized relief until it issues a broadly applicable declaratory ruling on the reach of Section 251, 252, and 706, together with a new set of general rules on collocation. ALTS Pet. 2-3, 36. But nothing in ALTS's petition disproves the particular facts on which U S WEST based its request for individual regulatory relief, and nothing prevents the Commission from promptly considering that request on its own merits. More fundamentally, ALTS does not explain why rural Americans should continue to be denied access to advanced data services and technologies while the possible need for more general rules is hashed out in these proceedings — especially where ALTS's members have shown virtually no interest to date in serving these customers.

ALTS begins its petition with a paean to the scope and pace of CLEC investment in data facilities. ALTS Pet. 6-7. As U S WEST explained in its request for relief, however, aggregated statistics on investment are beside the point: Virtually all new data facilities are being built in large, urban areas. Only nine of the twenty-seven LATAs in U S WEST region are served by more than one high-speed (DS-3 or greater) data backbone PoP, and seventeen of the twenty-seven are not served at all. Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Dkt. No. 98-26 at 8-19 (Feb. 25, 1998) ("U S WEST Pet."). To the extent that carriers' backbones serve smaller communities at all, they serve them with lower-capacity links that are more congested and more

expensive than those available in major cities. For example, while PSINet serves Seattle and Minneapolis with "MegaPOPs" that will soon operate at OC-3 speeds or higher, it serves Fargo, North Dakota (given by ALTS as an example of an "on net" location, ALTS Pet. 7) with a single T1.[2/] ALTS contends that CLECs are active in Sioux Falls, Bozeman, and Fargo, id., but provides no information about what facilities the CLECs have actually deployed. It is noteworthy that the Boardwatch Magazine survey of backbone providers does not show that a single high-speed PoP has been deployed in any of these cities.[3/]

ALTS next observes, correctly, that U S WEST has announced an aggressive roll-out of xDSL services to forty cities throughout its service region. ALTS Pet. 8. From there, ALTS jumps to the conclusion that U S WEST does not need regulatory relief. Again, ALTS ignores where this deployment is taking place. These forty cities are the largest in each of U S WEST's fourteen states, and they are the only places where it is currently economic for U S WEST to roll out xDSL services in the absence of regulatory relief.

The bulk of ALTS's petition is a litany of anecdotes allegedly demonstrating that its members have suffered repeated mistreatment at the hands of the BOCs. Many of the complaints have nothing at all to do with data services, and much space is spent taking gratuitous potshots at the Bells for being successful in court. U S WEST sorts through this list in Part III of these comments and identifies which of ALTS's concerns may be justifiable and which are not. But even taking all of these complaints as legitimate for the moment, ALTS has virtually nothing

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2/ See Ex Parte Presentation by Mark J. O'Connor, Attorney for PSINet Inc., CC Dkt. Nos. 98-32, 98-11, 98-26 at 3 (May 13, 1998).

3/ See http://www.boardwatch.com/ISP/backbone.html.

to say about U S WEST. ALTS presents no evidence at all that U S WEST is failing to provide CLECs with unbundled conditioned loops or adequate collocation. In its twenty-one pages of complaints, ALTS cites only two instances of alleged wrongdoing by U S WEST, neither of which is documented or substantiated, and neither of which involves the provision of facilities for the DSL or backbone services at issue here.[4/]

The reason for the lack of complaints is that U S WEST, as it demonstrated in its request for relief, has been ready and willing to provide CLECs with what they need to offer competitive data services: conditioned loops and a range of collocation options, including arrangements for cageless collocation and collocation outside central offices. As U S WEST testified to the Commission in a recent en banc hearing, U S WEST, uniquely among the BOCs, offers CLECs Single Point of Termination (or "SPOT") collocation that eliminates the need for cages. U S WEST has deployed 111 SPOT frames in central offices throughout its region. (Part III discusses SPOT collocation in greater detail.)

ALTS would no doubt respond that U S WEST must go further and provide CLECs with unbundled, cost-based access to DSLAMs purchased and installed by U S WEST and other electronics U S WEST uses to provide xDSL services. But as U S WEST explained in its petition for relief, U S WEST Pet. 49, and as it sets forth in greater detail in Parts II.B and E,

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[4/] ALTS's undocumented complaint (Pet. 25) about supposed delays in providing trunking in an end office serving an extremely fast-growing area in Vancouver, Washington does not involve facilities used to provide xDSL, and the CLEC is not receiving differential or discriminatory treatment. U S WEST is investigating ALTS's other complaint about U S WEST's alleged delays in delivering multiplexing equipment in Boise, Idaho (Pet. 17), but is having difficulty because this complaint, too, is undocumented. U S WEST has attempted to contact ALTS's outside counsel several times to learn more details, but its calls have not been returned.

there is no technical reason why a CLEC must or should be empowered to obtain these electronics from the incumbent; rather, a CLEC can purchase this equipment from one of many competitive providers and collocate it in the incumbent's premises. Several forthright CLECs conceded as much in their comments on U S WEST's petition for relief. For example, MCI argued that it was so easy for CLECs to provide xDSL services using their own electronics that BOC provision of these services was unnecessary:

> CLECs can efficiently provide DSL technologies as sufficiently as US West and other BOCs. . . . A CLEC can place the DSLAM in a collocated space in the BOC's CO just as readily as the BOC can place the DSLAM in its CO. Upfront investment costs to the provider are low.

Opposition of MCI Telecom. Corp., CC Dkt. No. 98-26 at 10 n.3 (Apr. 6, 1998). Other CLECs have confirmed this proposition since then. For example, Charles McMinn, the President and CEO of Covad — a company whose business is to provide competitive high-speed data services using unbundled loops — recently said in an interview that, notwithstanding ALTS's demand, CLECs do not in fact need unbundled electronics:

> We are happy if they [the incumbent LECs] don't provide any of the electronics, let us put our own electronics in place, and charge us an appropriately low charge just for the copper line. . . .
>
> Some of the members of ALTS . . . would go further and say that when an ILEC deploys DSL services in a central office, the ILEC must provide CLECs with access to it. They want them to go the extra step of installing those electronics and leasing those lines to the CLEC, one line at a time. We're not insisting on that.

"On the Record: Covad CEO Aims To Make DSL As Pervasive As Current Modems," Telecom. Reports (June 1, 1998) at 44. ALTS provides nothing to the contrary in its petition but its unexplained and unsupported assertions. See ALTS Pet. 15 n.22.

Finally, ALTS's new concern for preserving states' authority is a red herring. Granting U S WEST's petition for relief would not encroach on state jurisdiction. U S WEST has not asked the Commission to preempt any state regulation. It provides its xDSL services pursuant to state tariffs. Moreover, as U S WEST explained in its petition for relief,[5/] its xDSL and proposed backbone services are in fact data services that supplement its traditional voice offerings and strengthen (rather than obviate) the circuit-switched network; these technologies move data communications to a separate network before they reach a circuit switch, thereby alleviating the network congestion caused by the longer holding times of data calls. There is no realistic concern that U S WEST is attempting to migrate its core telephone services out from under state jurisdiction. In short, nothing in the ALTS petition refutes the showing U S WEST made to support its request for regulatory relief, and the Commission's consideration of this petition should not prevent it from promptly considering and granting U S WEST's request.

5/ See U S WEST Pet. 51 n.32. In addition, it is unclear exactly what state role the Commission would be preempting. As explained in Part II.A, Section 251(c) and the derivatively applicable provisions of Section 252 do not apply to these data services because they are not "local exchange carrier" services; states therefore have no power under those sections to order further unbundling of these services. And, as explained in Part II.C, the Commission has the power under Section 153(25) to modify LATA boundaries for the limited purpose of enabling BOCs to provide data services. The Commission has held that its jurisdiction to make these modifications is exclusive. See Petition for Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona, Order, 12 FCC Rcd. 4738, 4746-48 ¶¶ 16-19 (1997).

II. ALTS'S PROPOSED DECLARATORY RULING ON THE SCOPE OF SECTIONS 251, 252, 271, AND 706 CANNOT BE SQUARED WITH THE TELECOMMUNICATIONS ACT.

ALTS simply asserts, without legal argument, that Sections 251(c), 252, and 271 necessarily govern the BOCs' provision of advanced data services unless the Commission forbears from their application. ALTS Pet. 14. But this unexamined premise is wrong. First, by its plain terms, Section 251(c) (and the consequently applicable provisions of Section 252) applies to a carrier only in its capacity as an incumbent "local exchange carrier" — that is, only to the extent it is providing "telephone exchange service or exchange access." The data services at issue here are neither telephone exchange service nor exchange access. Second, even if the unbundling provisions of Section 251(c) could apply to these services, the Commission still has the power under Section 251(d)(2) to exclude the non-bottleneck elements of these data networks from the list of elements that must be unbundled. And third, with respect to Section 271, Congress gave the Commission express authority to modify LATA boundaries, and the Commission has properly recognized that this power can and should be used to lift LATA boundaries for the limited purpose of enabling BOCs to bring data services to customers who would otherwise be uneconomic to serve.

ALTS then makes the same argument about the scope of the Commission's forbearance power that it made in response to U S WEST's petition: namely, that the power to forbear under Section 706 is severely constrained by Section 10(d). ALTS Pet. 33-36. This, too, is incorrect. The plain language of Section 706 directs the Commission to lift all regulatory barriers, without limitation, that are hindering the deployment of advanced services to "all Americans." The language of Section 706 contains no cross-reference to Section 10, and

interpreting Section 706 as a redundant cross-reference would eliminate it as a tool for achieving Congress's infrastructure goals.

Finally, these legal conclusions are reinforced by sound policy considerations. Indiscriminately stretching the regulatory requirements designed for circuit-switched voice telephony to cover advanced data services, as ALTS suggests, would discourage incumbent LECs from making the investments needed to provide these services, thereby frustrating the Act's goal of encouraging the widest possible deployment of advanced infrastructure. And extending such regulation to an already competitive market and to non-bottleneck facilities is not necessary to ensure that these services remain open to competition.

A. The Unbundling and Discounted Resale Requirements of Section 251(c) Do Not Apply to Advanced Data Services Because They Are Not "Telephone Exchange Service or Exchange Access."

Under the Telecommunications Act, a carrier is subject to different interconnection duties depending on the particular capacity in which it is providing service. All "telecommunications carriers" — a category that includes incumbent LECs, CLECs, and IXCs, among others — must interconnect their networks with the networks of other carriers and meet access and interoperability standards. See 47 U.S.C. § 251(a). To the extent such a carrier is also acting as a "local exchange carrier," it must allow resale, provide number portability and dialing parity, give access to its rights of way, and pay reciprocal compensation for transport and termination. Id. § 251(b). And if the carrier provides service as an "incumbent local exchange carrier," it must do so subject to the full list of duties in 47 U.S.C. § 251(c), including unbundling and discounted resale. (These three categories do not exhaust the possibilities; for

example, to the extent a carrier uses its telephone network as a "cable system," it is not subject to Title II interconnection obligations at all. See id. §§ 522(7)(C), 571(b).) The Commission has acknowledged that these statutory classifications place upper limits on the interconnection obligations that state and federal regulators may impose on a carrier.[6/]

The capacity in which a carrier is providing a given service (and, accordingly, the carrier's interconnection obligations with respect to that service) is determined by the nature of the service itself. If the service in question is a "telecommunications service" but not a local exchange service, the provider is acting as a "telecommunications carrier" and must provide the service subject to Section 251(a). See id. § 153(44). Conversely, if the service is not a "telecommunications service" (if it is an information or cable service, for example), the provider is not subject to Section 251(a) with regard to that service because it is not acting as a "telecommunications carrier." The same is true for Sections 251(b) and (c), which apply to "local exchange carriers" and "incumbent local exchange carriers." A carrier is acting as a "local exchange carrier" only where and to the extent that it is "engaged in the provision of telephone exchange service or exchange access," id. § 153(26); if the carrier is providing something that is not a "telephone exchange service or exchange access," it is not acting as a "local exchange carrier," and it may provide the service without regard to Sections 251 (b) and (c).

6/ The Commission has held, for example, that the Act's classification scheme forbids a state from imposing the stricter interconnection duties of Section 251(c) on a LEC that does not in fact provide service as an incumbent. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16109 ¶ 1247 ("Interconnection First Report and Order").

These provisions of the Act reflect that a single carrier may act in different capacities when it provides different services. The same telephone company may be providing information services, cable services, local exchange services (i.e., telephone exchange service or exchange access), incumbent local exchange services, or telecommunications services other than local exchange services. And the regulatory duties to which the carrier is subject vary with, and are specific to, the particular service it is providing. AT&T is certificated as a CLEC in every state, for example, and when AT&T provides local exchange services as a CLEC, it must provide them subject to Section 251(b). But it is not subject to that section when it provides non-local-exchange services: A competitor cannot demand the right to resell AT&T's long-distance voice and Internet backbone services under Section 251(b)(1), or demand access to AT&T's rights-of-way containing its interexchange fibers under Section 251(b)(4), simply because AT&T is also a CLEC. In other words, the specific duties of Section 251(b) must be read in the context of (and are necessarily cabined by) the statutory language specifying that the duties apply only to "local exchange carriers."[2/] Were it otherwise, the section would sweep in all of AT&T's service offerings, despite Congress's intent that different services be regulated differently.

2/ See O'Connor v. United States, 479 U.S. 27, 31 (1986) (Scalia, J.) (treaty provision literally exempting workers from "any taxes" must be read in context of preceding language discussing foreign taxes only, and is similarly limited); Alarm Indus. Communications Comm. v. FCC, 131 F.3d 1066, 1070 (D.C. Cir. 1997) ("When the supposed plain meaning of one clause in a section renders another clause nugatory, it is time to put aside the dictionaries and start considering what interpretation best comports with congressional intent."); Bell Atlantic Tel. Co. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("Textual analysis is a language game played on a field known as 'context.' The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.").

The same is true for Section 251(c). A carrier is subject to that section only when it is acting as an "incumbent local exchange carrier" — that is, only when it is providing "telephone exchange service or exchange access" in a geographic area where it is an incumbent. See id. §§ 153(26), 251(h)(1). As with Section 251(b), the specific unbundling and resale duties in Sections 251(c)(3) and (4) must be read with (and are limited by) the language in Section 251(c) specifying that these are duties of "incumbent local exchange carriers"; otherwise, Section 251(c) would swallow the other sections of the Act.[8/] A service-by-service reading comports with the common understanding of the Act: Sprint and GTE are incumbent LECs in some service areas, but nobody seriously suggests that CLECs could obtain unbundled access to Sprint's interexchange network under Section 251(c)(3), or avoided-cost discounts on GTE's long-distance and international calling services under Section 251(c)(4), because these are not services provided by Sprint or GTE in its capacity as a "local exchange carrier." In addition, the proposition that an entity might be subject to regulation as an incumbent LEC for some purposes

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8/ For example, Title VI makes clear that an ILEC may use its telephone plant as a "cable system" to "transmi[t] video programming directly to subscribers," and may do so free from Title II obligations. See 47 U.S.C. §§ 522(7)(C), 571(b). One promising way for a telephone carrier to do this is by using VDSL technology closely akin to the data services at issue here. Stretching Section 251(c) to apply to every telecommunications-based service an incumbent LEC provides would subject these cable services to Title II unbundling and discounted resale, in direct conflict with Title VI.

It is no answer to say that Section 251(c)(4)(A) refers to "any telecommunications service" an incumbent LEC provides. Courts have made clear that when "any" is used in conjunction with statutory language defining a class subject to the rule, the term means "all within that particular class," not simply "all." See O'Connor, 479 U.S. at 31; Bell Atlantic, 131 F.3d at 1047 ("Although Petitioners rely on the expansive character of the word 'any,' the Supreme Court has specifically held that in context the word 'any' may be construed in a non-expansive fashion.").

and services but not others is unremarkable, and has been recognized by the Commission in other contexts.[9/]

Contrary to ALTS's assertion, U S WEST's advanced data networks and services are not subject to unbundling and discounted resale under Section 251(c), because U S WEST is not acting as a "local exchange carrier" when it provides them: They do not involve the provision of "telephone exchange service or exchange access." 47 U.S.C. § 153(26). "Telephone exchange service" is defined as

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered through the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Id. § 153(47). The Commission has long interpreted the first part of this definition narrowly to refer to "the provision of two-way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area" — in other words, to have "its plain, ordinary meaning" of local, circuit-switched voice telephone

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9/ See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905, 22054 ¶ 309 (stating that a BOC affiliate is subject to Section 251(c)(3) unbundling requirements only with respect to "local exchange and exchange access facilities and capabilities" transferred from the BOC); Interconnection First Report and Order, 11 FCC Rcd at 15995 ¶ 1004 (holding that incumbent LECs' CMRS affiliates are not themselves LECs subject to 47 U.S.C. §§ 251(b) and (c)).

service.[10] The data backbone and xDSL services at issue in U S WEST's request for relief are not voice services, do not use any centralized circuit-switching, do not begin and end "within a telephone exchange, or within a connected system of exchanges," and travel between offices only over dedicated data facilities.[11] Indeed, one of the primary benefits of deploying xDSL is that it removes data communications from the voice network before they reach any circuit switch.

Nor are data backbone and xDSL services "comparable" to traditional telephone exchange service. Cf. 47 U.S.C. § 153(47)(B). The Commission has held that whether a service is "comparable" depends on whether it is primarily a substitute for two-way, switched, wireline voice services.[12] As U S WEST set forth in its petition, the advanced services at issue are, in fact, data-only services that supplement, and do not obviate, circuit-switched services; U S WEST has committed not to market packetized voice services until it receives appropriate

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[10] Domestic Public Radio Svc., Second Report and Order, 76 FCC 2d 273, 281-82 ¶¶ 13, 14 (1980). See also, e.g., Offshore Tel. Co. v. South Cent. Bell Tel. Co., 6 FCC Rcd 2286, 2287 ¶ 11 (1991) ("a local calling capability that permits a community of interconnected customers to make calls to one another over a switched network"); Midwest Corp., Mem. Op. and Order, 53 FCC 2d 294, 300 ¶ 10 (1975) ("the provision of individual two-way voice communication by means of a central-switching complex to interconnect all subscribers within a geographic area"); cf. North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1045 (4th Cir. 1977) ("The term 'telephone exchange service' is a statutory term of art, and means service within a discrete local exchange system.") (emphasis added).

[11] DSL communications do share the local loop with circuit-switched voice services until they reach the DSLAM, but this not enough to make them "telephone exchange services." See American Tel. & Tel., Mem. Op. and Order, 38 FCC 1127, 1134 ¶ 20 ("[T]he fact that TWX [teletypewriter exchange] service, in some aspects, makes use of exchange facilities in common with telephone exchange service does not convert TWX into telephone exchange service.").

[12] See Interconnection First Report and Order, 11 FCC Rcd at 15999, ¶ 1013 (holding cellular, broadband PCS, and SMR services to be "comparable" to traditional telephone exchange services because "these CMRS providers provide local, two-way switched voice service as a principal part of their business").

Section 271 authorizations. More generally, as the Commission has recognized, distributed packet- and cell-switched services are fundamentally unlike traditional circuit-switched voice, and regulations governing the latter cannot be extended uncritically to the former.[13/] These data services therefore do not fall under either part of the definition of "telephone exchange service."

It is equally clear that these services do not constitute "exchange access," defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." § 153(16). The backbone and xDSL services at issue have nothing to do with originating or terminating toll calls and, as just noted, would not offer access to U S WEST's circuit-switched "telephone exchange services or facilities." Because these services are therefore neither "telephone exchange service" nor "exchange access," a carrier providing them is not acting as an "local exchange carrier" as defined by the Act, and its provision of these services is not governed by the unbundling and discounted resale rules of Section 251(c).

B. Even If Advanced Data Services Were Subject to Section 251(c), the Commission Could and Should Decline To Require Such Unbundling Pursuant to Section 251(d)(2).

Even if advanced data services were somehow "telephone exchange services" potentially subject to Section 251(c), ALTS would still not be correct that the Commission must require unbundling of network facilities used to provide those services. Congress expressly gave the Commission the discretion to "determin[e] what network elements should be made available"

[13/] See, e.g., Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, 11 FCC Rcd 21354, 21391 ¶ 311 (1996).

among the elements potentially subject to unbundling. 47 U.S.C. § 251(d)(2). Moreover, Congress set forth specific criteria the Commission must use in making this determination, and the xDSL electronics to which ALTS demands access do not meet those criteria.

Congress clearly intended that the Commission would not indiscriminately order incumbent LECs to unbundle each and every facility they own. It provided that the Commission "shall consider, at a minimum," whether the failure to provide access to particular network elements would "impair" the ability of requesting carriers to provide service, or, in the case of proprietary elements, whether unbundled access to the elements in question is "necessary." Id. (emphasis added). In articulating these standards, Congress directed the Commission to make some finding of actual need before an incumbent would be required to unbundle any particular element. In other words, it limited an incumbent LEC's unbundling obligation to those network facilities that, in the Commission's judgment, need to be available from the incumbent LEC to enable the requesting carrier to compete effectively.

A CLEC does not genuinely need to obtain a particular element owned by an incumbent LEC — and lack of access to the element cannot "impair" the CLEC's ability to provide service — if the same element is readily available from another source. Where such an equivalent is available, the CLEC can provide service without relying on the incumbent LEC's facility at all. Moreover, requiring the incumbent to provide unbundled access to such nonessential facilities would contribute nothing towards the goal of the Act's unbundled access provisions. Congress included those provisions to ensure that incumbent LEC control of certain bottleneck facilities would not impede market entry by new facilities-based competitors. Where a facility is not a bottleneck, it poses no impediment to new competitors. Thus, consistent with

the plain text of Section 251(d)(2) and purpose of Section 251(c)(3), the Commission should refrain from requiring the unbundling of incumbent LEC facilities that can be duplicated in the marketplace on economically reasonable terms.

ALTS asks the Commission to ignore this important limitation and to require the unbundling of all facilities used in the provision of advanced data services — the conditioned loops, the DSLAMs, and the routers and data transport facilities that make up an incumbent's cell- or packet-switched network. Of these facilities, only the loop is not readily available from sources other than incumbent LECs. Accordingly, as detailed in Part III below, U S WEST has committed to provide its competitors conditioned local loops on an unbundled basis and offers collocation (including cageless collocation) so that the competitors may connect the loops they buy with other equipment, including DSLAMs.

All the other data facilities ALTS seeks can be purchased at market prices from independent equipment vendors. The market for such equipment is fiercely competitive, and there is no risk that a competitor that lacks access to the incumbent LEC's facilities would be unable to obtain the desired equipment. Indeed, U S WEST buys its advanced data equipment from outside suppliers; competitors could go to the same suppliers and buy the same equipment.

Thus, any competitor may obtain unbundled loops from an incumbent such as U S WEST and combine those loops with DSLAMs, routers, and transport facilities acquired from other sources in order to provide data service in competition with the incumbent. As noted above, MCI acknowledged in its comments on U S WEST's petition that CLECs can deploy DSL technology just as efficiently as an incumbent, and the CEO of Covad has plainly stated that his company is perfectly happy to provide its own DSL electronics instead of leasing them from

the incumbent. Commissioner Ness likewise recently noted that "[t]he evolving DSL equipment necessary to carry high-speed digital signals on properly conditioned local loops is available to both the ILECs and the CLECs. So is the associated multiplexing and routing/switching equipment necessary to create advanced high-speed data communications services."[14/] And the Commission staff have recognized that some companies are already purchasing unbundled loops from incumbent LECs and combining those loops their own DSLAMs and packet-switched networks to offer xDSL and ISDN service to business customers.[15/]

ALTS does not even attempt to show that there is anything unique or essential about the particular facilities in the incumbent LECs' data networks. Indeed, since DSLAMs, routers, and data transport facilities are available in the marketplace to anyone with adequate capital, ALTS's real request is that CLECs be relieved of the task of raising capital to make investments. And ALTS effectively concedes this, noting that CLECs' "access to capital and their ability to construct is not adequate to replicate the bottleneck facilities in the hands of the incumbents." ALTS Pet. 7-8. But Section 251(c) does not require incumbents to provide financial services to CLECs. If a CLEC fails to secure appropriate financial backing, that provides no basis for requiring the incumbent to raise capital and make investments on the CLEC's behalf.

14/ "To Have and Have Not: Advanced Telecommunications Technologies," Remarks of Commissioner Susan Ness Before the Computer and Communications Industry Association's 1998 Washington Caucus at 8 (June 9, 1998).

15/ See Kevin Werbach, A Digital Tornado: The Internet and Telecommunications Policy, Office of Plans and Policy Working Paper at 34 (Mar. 1997).

Moreover, Section 706 of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and to "remove barriers to infrastructure investment." Thus, there can be no question that it would be legally appropriate for the Commission, in exercising its authority under Section 251(d)(2), to refrain from requiring unbundling of advanced data facilities in order to avoid impairing investment incentives.

In sum, there is no legal basis for ALTS's demand that the Commission require the unbundling of all equipment used to provide advanced data services. The loop should remain subject to the Act's unbundling requirements so long as it remains a bottleneck, but the other facilities that ALTS seeks are plainly available from other sources and hence outside the intended scope of Section 251(c)(3). Therefore, even on the untenable assumption that data facilities are potentially subject to Section 251(c)(3) in the first place, the Commission should, consistent with its responsibilities under Section 251(d)(2), decline to require the unbundling of such facilities.

C. As the Commission Has Recently Recognized, Section 271 Does Not Prevent the Commission from Modifying LATA Boundaries To Enable BOCs To Provide Data Services to Customers Who Would Not Otherwise Receive Them.

The Commission can and should use its LATA modification authority to permit U S WEST to build and operate cell- and packet-switched data networks across LATA boundaries. The Commission has express authority to modify LATA boundaries, 47 U.S.C. § 153(25)(B), and noted in a recent decision that "nothing in the statute or legislative history